No. 85-148

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

BLUE CROSS and BLUE SHIELD OF MICHIGAN,
a nonprofit Michigan corporation,

Appellant,

—against—

WILLIAM G. MILLIKEN, Governor of the State of Michigan, FRANK J. KELLEY, Attorney General of the State of Michigan, and NANCY A. BAERWALDT, Commissioner of Insurance of the State of Michigan,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF MICHIGAN

REPLY BRIEF IN OPPOSITION TO MOTION TO DISMISS

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Preliminary Statement

Appellant Blue Cross and Blue Shield of Michigan ("BCBSM") submits this brief in opposition to appellees' motion to dismiss this appeal. Nothing in appellees' motion detracts from the demonstration in BCBSM's Jurisdictional Statement that the question presented is substantial and worthy of this Court's plenary consideration.

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1 Blue Cross and Blue Shield of Michigan is a nonstock corporation which has no subsidiary or affiliated corporations except those that are wholly owned.

I

APPELLEES' ARGUMENT THAT THE QUESTION PRESENTED WAS NOT PASSED UPON BELOW IS SPECIOUS

The bulk of appellees' motion to dismiss is devoted to an argument that has already been discussed and disposed of in the Jurisdictional Statement—the utterly specious assertion that the question presented was not raised or decided below. *See* Jurisdictional Statement at 14 n.8.

The Justices of the Michigan Supreme Court would no doubt be astonished to learn that they had not passed upon the "taking" issue. The majority squarely acknowledged and rejected "BCBSM's alleg[ation] that 1980 PA 350 has effectively removed from BCBSM control over its corporate direction" and thus effected "a taking of BCBSM's property without due process of law." 422 Mich. at 46. The majority's holding could not have more clearly resolved the issue presented by this appeal: "We do not think that the action taken here constitutes a taking . . . [T]he regulation in question does not amount to a 'taking.' . . . We fail to see how this provision constitutes a governmental 'taking' of BCBSM's property." 422 Mich. at 45, 47.[2]

Justice Levin, in dissent, was equally clear in taking issue with the majority's holding: "I would hold that [the corporate control] provisions effect a taking of 'private property' within the meaning of the Constitutions of the United States and of this state. . . ." 422 Mich. at 98 (footnotes omitted).

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2 Indeed, the majority passed upon BCBSM's Taking Clause challenge a *second* time, when it denied a motion for rehearing directed to that very issue. In successfully opposing BCBSM's motion, appellees stated that "[t]he claims made and the arguments presented are the same claims and arguments that this Court has already considered. There is no need for a rehearing." Brief in Opposition to BCBSM Request for Rehearing or Stay and in Support of Motion for Immediate Entry of Judgment Order at 1.

In short, it is as clear as daylight that the question presented was raised and passed upon below.[3]

II

THIS APPEAL DOES NOT TURN ON THE CHARACTERIZATION OF BCBSM AS A PRIVATE OR "QUASI-PUBLIC" CORPORATION

Appellees contend that PA 350 did not effect a taking of private property because, allegedly, BCBSM is a quasi-public rather than a private corporation. The short answer is that the characterization of BCBSM as a private or quasi-public corporation is beside the point; the pertinent question is whether there has been a taking of private property. Property is either privately or publicly owned. And, as demonstrated in the Jurisdictional Statement at 17-18, "[n]either government regulation of BCBSM nor its status as a nonprofit corporation negates the existence of [the property] interest" of BCBSM's membership in corporate control. That interest constituted private property; it did not belong to the state.

Appellees' assertion that BCBSM is a quasi-public corporation is not only irrelevant, but it is wrong. No Michigan court has declared BCBSM to be a quasi-public corporation and, under Michigan law, it is not.

Although appellees contend that *Swan* v. *Williams*, 2 Mich. 427 (1852) sets forth the controlling definition of "public," "quasi-public" and "private" entities under Michigan law, they

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3 In an attempt to obfuscate, appellees quote a statement in BCBSM's reply brief in the Michigan Supreme Court which, when read out of context, appears to disclaim a challenge to certain sections of the statute under the due process clause. Motion to Dismiss at 17. However, it is abundantly apparent from the context that the statement referred to BCBSM's separate substantive due process challenge (not raised on this appeal), not to its "taking" claim. Indeed, even appellees acknowledge, when they discuss the merits, that "fundamentally, [the court below] found that the regulation did not rise to a taking." Motion to Dismiss at 26.

tellingly fail to provide the definition of "quasi-public" given in that case. *Swan* held that "quasi-public" corporations are those created for public benefit "to which the government has delegated its sovereign power," such as turnpikes, bridges, canals and railroads. 2 Mich. at 435.[4] In contrast, the Michigan court classified insurance and *eleemosynary* corporations as private corporations. *Id.* Thus, under the *Swan* definitions, BCBSM is clearly private, rather than quasi-public.

Appellees nevertheless maintain that the "majority" of the Michigan Supreme Court labeled BCBSM a quasi-public entity in *Westland Convalescent Center* v. *Blue Cross & Blue Shield of Michigan*, 414 Mich. 247, 324 N.W.2d 851 (1982). Motion to Dismiss at 20. But as noted in the Jurisdictional Statement at 18 n.10, "the dictum characterization in that case of BCBSM as a 'quasi-public' entity was joined in by only two of seven members of the Michigan Supreme Court." And in *this* case, as appellees acknowledge, "the Michigan court did not reach the private/quasi-public issue when it ruled on BCBSM's due process claims because, fundamentally, it found that the regulation did not rise to a taking." Motion to Dismiss at 26.[5] Accordingly, even if the proper characterization of BCBSM under Michigan law were somehow relevant to the existence of a property interest, the proper disposition of this appeal would be a reversal and a remand for further proceedings under state law in the event that this Court has any doubt as to BCBSM's private character under *Swan*.

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4 Consistent with this definition, Michigan courts have characterized school districts, utilities, and others having the power of eminent domain as "quasi-public" corporations. Dohm v. Township of Acme, 354 Mich. 447, 93 N.W.2d 323 (1958); City of Detroit v. State of Michigan, 31 Mich. App. 563, 188 N.W.2d 146 (1971).

5 Justice Levin, however, made plain that in his view BCBSM is *not* a quasi-public corporation. 422 Mich. at 119 n.31.

III

BCBSM'S CORPORATE MEMBERSHIP HAS BEEN TOTALLY DISPOSSESSED OF ITS PROPERTY

BCBSM's corporate membership controls its affairs by exercising its powers to amend the articles of incorporation and bylaws, to select the board of directors and to determine its own succession. PA 350 not only dispossesses the corporate members of all of these powers, but also strips them of their very right to be members. *See* Jurisdictional Statement at 10-12, 21-22.

Appellees argue that this total dispossession does not amount to a "taking," because the new board of directors *may* authorize a new corporate membership, and the new members *may* be allowed to serve on committees of the board, or perchance even be elected to the board by a selection process over which neither the old nor the new members have any control. Motion to Dismiss at 27. This is hardly a substitute for the current membership's control over BCBSM's destiny, which has been taken from them, or for the just compensation required by the Constitution.

IV

APPELLEES' ARGUMENT CONCERNING BCBSM'S REASONABLE EXPECTATIONS IS BASELESS

Appellees make two arguments concerning the reasonable expectations of BCBSM's corporate membership. First, they contend that the corporate membership took office knowing that BCBSM was regulated under Michigan law. But as BCBSM has already shown, "[w]hile BCBSM's membership could expect changes in regulatory requirements and constraints, nothing presaged Michigan's attempt to wrest control

of BCBSM from its lawful owners." *See* Jurisdictional Statement at 24.[6]

Second, appellees claim that BCBSM could not have expected to retain control over the corporation because it had proposed legislation similar to that enacted. But only a portion of the legislation to which they refer—House Bill 4340—incorporated suggestions of BCBSM; BCBSM opposed the bill as introduced. Moreover, House Bill 4340 did *not* seek to do away with BCBSM's corporate membership, as appellees contend. Instead, it left that subject to the corporate articles and bylaws. Nothing in House Bill 4340 would have taken from the membership its authority to select the board of directors, amend the articles of incorporations, or determine its own succession. In short, House Bill 4340 contained none of the corporate control provisions challenged on this appeal. Appellees' bald assertion to the contrary is simply incorrect.

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6 Appellees also pluck a sentence from Stott v. Stott Realty Co., 288 Mich. 35, 44, 284 N.W. 635 (1939) to buttress their argument that the corporate membership had no reasonable expectation of retaining control of BCBSM. But *Stott* did not hold that the state may take control of a nonprofit corporation from its corporate members without payment of just compensation. Rather, the case involved the validity of a statute which reinstated a corporate charter which had become void because of a failure to pay annual privilege fees. If appellees were correct in their reading of *Stott*, the Michigan Supreme Court presumably would have relied upon it in the case at bar.

CONCLUSION

For the reasons stated above and in the Jurisdictional Statement, the Court should note probable jursidiction of this appeal.

Dated: September 4, 1985

Respectfully submitted,

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